injustice has been caused to the defendants. It is argued that but for the extension of time the defendants would have been entitled to invoke Order LXII rule 5(2) which provides that "if a plaintiff makes default in giving security, his action may be dismissed." and that the effect of the order extending time was to deny the defendants the order they were seeking under Order LXII rule 5(2) without being heard and this amounted to an injustice to the defendants.

The main consideration in this appeal it appears to us is whether the decision of the learned Chief Justice would result in injustice being done to the defendants. It is clear that the right of the defendants to invoke Order LXII rule 5(2) has not been taken away completely. Even if the application of the defendants was heard on that day they might not have succeeded in getting the order that they were seeking. In our view no injustice has resulted to the defendants.

In our view, on the facts of the case, it was right and proper that the extension of time be granted to the plaintiff. There is no evidence to show that the plaintiff was not willing to comply with the order of the 22nd November, 1968. His whole conduct shows that he was making every effort to comply with it.

For these reasons we dismiss the appeal with costs.

Appeal dismissed.

Solicitors: *Chung & Co.; Donaldson & Burkinshaw.*

AW CHEN v. JOHANNES KOPLAN

[O.C.J. (Chang Min Tat J.) May 29, 1969]
[Ipoh — Civil Suit No. 323 of 1966]

Practice and Procedure — Service — Substituted service — Notice of writ for service outside jurisdiction — Principle governing order for substituted service — Defendant in foreign country but address unknown — Whether substituted service was proper.

The plaintiff failed to have a notice of writ of summons for service outside the jurisdiction served personally on the defendant at a specified Austrian address and renewed the writ on the ground that the writ could not be served because the defendant had left Austria, without leaving a forwarding address. The plaintiff subsequently applied for leave for substituted service on the same ground. Leave for substituted service was granted and the order was subsequently amended. The amended form of the order provided for substituted service by publishing the notice in a named Austrian newspaper, posting it in the High Court in Ipoh, and publishing it in *The Straits Times*. The order was carried out; an interlocutory judgment in default of appearance entered; and an application for a date for assessment of damages made.

The defendant's insurers now applied to set aside the service of the notice and all subsequent proceedings. It was contended in support of the application that the notice of the writ could not have been brought to the personal attention of the defendant in view of the admission in the plaintiff's affidavits that the defendant had left Austria. The plaintiff filed a further affidavit to the effect that the statement in the affidavits was inadvertently made in that what was all along intended was that the defendant had left the Austrian address and not Austria.

Held, dismissing the application: (1) the primary consideration which weighs with the court in determining whether or not to make an order for substituted service is as to how the matter can be brought to the personal attention of the person in question;

(2) in the circumstances of this case the substituted service was proper because there was no actual admission on the part of the plaintiff that the defendant had left Austria. Further although it was not known when the defendant had left the address given in the writ and subsequently Austria the evidence showed that the defendant was in Austria at the relevant time.

CIVIL APPEAL.

P.P. Dharmananda for the applicant/defendant.

Lal Harcharan Singh for the respondent/plaintiff.

Cur. Adv. Vult.

Chang Min Tat J.: This is an application made by the National Insurance Co. Ltd. in the name of the defendant, their insured, to set aside the service of the notice of the writ of summons and all subsequent proceedings, including an interlocutory judgment and an order for hearing to assess the damages in this running down case.

This case illustrates the difficulties encountered in initiating motions against drivers who could, I hope, without disrespect, be termed "birds of passage". The defendant in this case came to this country on a temporary contract of employement. The accident occurred during his stay here but when action was commenced, he had left the country. The solicitor for the plaintiff on enquiry from the then employers of the defendant discovered that the defendant had left this country on 24th August, 1965 and that his address in May, 1966 was at Lembach No. 86, Post Riegersburg, Steiermark, Austria, (hereinafter referred to as the address) and he had to obtain leave to issue the proposed writ of summons for service outside the jurisdiction and to serve a notice of the issue of the writ of summons on the defendant at the said address or elsewhere in Austria. Such leave was given to him on the 20th July, 1966, when it was ordered that the notice be sent for personal service on the defendant to the appropriate authority in Austria through the registrar of the High Court in Kuala Lumpur. On the 23rd December, 1966, the registrar returned the documents sent to him for service, unserved together with what was described by him as the summons issued by the district court of Feldbach,

Austria. The registrar further intimated that according to the Austrian Embassy in Bangkok, service could not be effected on the defendant as he had left his previous address in Austria without informing anyone of his destination and his present whereabouts were unknown to the Austrian authorities. The writ of summons having been renewed for another 6 months, the solicitor for the plaintiff obtained an order for substituted service on the defendant by (1) publishing the notice in a paper (the *Wiener Zeitung*, which was described by an official at the Austrian Embassy at Bangkok as being owned by the Austrian Government, was eventually chosen), and (2) posting the notice at the Town Hall or at any other prominent place in Post Riegersburg, Steiermark, Austria, and (3) posting in the High Court at Ipoh, and (4) publishing in the *Straits Times*.

The order for substituted service, as framed, could not be carried out as apparently it was not possible to post it at the Town Hall or at some prominent place in the Post Riegersburg, Steiermark, Austria. This became known as the result of information received from one Dr. Walter Hecht, an Austrian lawyer practising at Stubenring 6, Wien 1, Austria, who had been instructed by the plaintiff's solicitor for this purpose. As a result thereof, the plaintiff obtained a deletion of the order for such posting. After due compliance with the amended order for substituted service, the plaintiff entered an interlocutory judgment against the defendant on default of appearance on 19th April, 1968. By notice of motion filed on the 22nd May, 1968, the plaintiff applied for a date for the assessment of the damages he had suffered. But before it could be heard, the insurers of the defendant in the name of the defendant applied, some three years after the commencement of the action, on the 20th May, 1969, to set aside the service of the notice of the writ of summons and all subsequent proceedings on the grounds (1) the service of the notice has not been effected in accordance with the Rules of the Supreme Court, 1957, (2) the service is a nullity, alternatively, it is irregular, (3) there has been no service, and (4) the entry of interlocutory judgment is a nullity, alternatively it is irregular.

It is submitted by counsel for the applicant that the primary consideration which weighs with the court in determining whether or not to make an order for substituted service is, as to how the matter can best be brought to the personal attention of the person in question. With respect I agree. The question whether this objective has been achieved or not is generally, as I consider it, not difficult to determine. There is however a certain amount of difficulty in this case occasioned to a large extent by the extremely loose use of language on the part of the plaintiff. It is only natural for a party to latch on to every admission or what seemed to be an admission made by the other party in his favour. Counsel for the applicant found one such admission. In paragraph 7, of his affidavit (Encl. 12) in support of the application for the renewal of the writ of summons and in paragraph 5 of his affidavit (Encl. 15) in support of the application for substituted service there appeared to be an admission that service could not be effected on the defendant as he had left Austria without leaving a forwarding address. On the strength of this admission, it is said by counsel for the applicant that the publication in the Austrian Government newspaper the *Wiener Zeitung* would not achieve its objective of bringing the notice of the action against him to the defendant. If he was out of Austria he would not be likely to read this newspaper. That might well be so but I venture no opinion whether the absence of a party from his fatherland at the time of the publication is, *per se*, sufficient to render nugatory the order for substituted service, and indeed it is unnecessary for me to do so, as I find within the court file sufficient for me to come to a decision.

Now what are the facts. Counsel for the plaintiff on realising the effect of his admission after reading the affidavit in support of this application filed a further affidavit (Encl. 32) that in the said paragraph 7 of his affidavit (Encl. 12) the words "Lembach No. 86, Post Riegersburg, Steiermark" were inadvertently left out before "Austria". Though he did not do so specifically, I take it he also meant to correct paragraph 5 of his affidavit (Encl. 15) similarly. The question then is whether counsel for the plaintiff is right in claiming an accidental omission. The answer lies as much in the letter of the registrar of the High Court, Kuala Lumpur, as in the so-called summons issued by the district court of Feldbach, Austria. In his letter, the registrar wrote that according to his information the defendant had left his previous address in Austria without informing anybody of his destination. As for the so-called summons, I found it in the possession of counsel for the plaintiff to whom it had apparently been delivered by the registry in Ipoh, for what reasons I am not advised. With the consent of both counsel, I had a look at it and I have now kept it in the court file. It is nothing more or less than an official envelope addressed to the defendant at his given address. It bore postal marks indicating various dates, 8th, 9th and 10th November, 1966. It had also pasted to it the postal slip in conventional use by postal authorities to indicate the reason for non-delivery and on this slip was marked a

cross in the box between the German *"ABGEREIST"* and the French *"PARTI"*. This cover was never translated into English. I know no German but I know the French word *"parti"* to mean *"left"* or *"departed"*. Looked at carefully, there is nothing either in the letter from the registrar or in the so-called summons to indicate that the defendant in November, 1966 had left the country. All that was indicated is that he had left his then address. It therefore seems to me that counsel for the plaintiff is right in denying that there was any actual admission on his part that the defendant had left Austria.

It is of course not known when the defendant left his address in Austria but if all that can be said is that he had left his address by November, 1966, that does not mean that he had left Austria. In the absence of any information or proof that he had left Austria altogether, then it does not seem to me correct on this alone to say that the publication of the notice in the *Wiener Zeitung* on 6th December, 1967 cannot be taken to be sufficient to bring the action to the notice of the defendant. It thus appears to me on a proper and reasonable reading, that counsel for the applicant has failed to establish the basis on which he has grounded his application.

On the other hand, there would appear to be confirmation that the defendant was in Austria at the relevant time. It is not very material as the onus is on the applicant to establish that the order for substituted service was wrongly obtained and executed. However, Dr. Walter Hecht who was engaged by the plaintiff to effect the substituted service by posting at the Town Hall or at any prominent place in Post Riegersburg, Steiermark, Austria, to comply with the original order for substituted service wrote on the 28th February, 1967 in the following terms:—

"Neither is it possible to have a notice posted on an official notice board. I therefore wrote a registered letter to Koplan which obliged him either to sign the receipt or to state that he refuses to accept the letter. This was returned to me as Koplan had moved and when I wrote to his address indicated by the post, that was returned to me with the note "left the country". This latter card I can forward to you if that is any good to you (I can also add a translation of the postal note if you want to.)."

On a careful reading of this letter, it seems to me reasonably certain that at the very least, after leaving the address, the defendant had at least one other address if not several other addresses in Austria before leaving the country, that when Dr. Walter Hecht wrote to the defendant at an address in Austria which of course need not be the one on the writ of summons, the letter was returned with intimation of another address in Austria, and that from this last address or from some subsequent address, the defendant left the country. The date of such departure is of course not at present ascertained but it is in my view quite definite that it was subsequent to the order for substituted service and very probably subsequent to the publication in the *Wiener Zeitung*.

The application is therefore dismissed with costs.

Application dismissed.

Solicitors: *Dharmananda & Co.; L.H. Singh & Co.*

CHAI HUAT SENG v. HOCHTIEF-HOLZMANN

[O.C.J. (Chang Min Tat J.) May 30, 1969]
[Ipoh — Civil Suit No. 676 of 1967]

Practice and Procedure — Appearance — Dismissal of action for failure of plaintiffs to appear at hearing — Application for restoration case — Negligence of plaintiffs' solicitors — Action not time-barred — Order for restoration — Plaintiffs to pay costs.

A solicitor of a firm of solicitors who acted for the plaintiffs left the country after the case had been set down for trial by the defendants under the impression that the case would not come on for hearing until after a year from then. During the absence of the solicitor the defendants obtained a consent order for an early trial on the ground that a material witness of theirs who had full and personal knowledge of the matters involved in the case was leaving the country. While the solicitor was still away a date for the hearing of the case was fixed and the plaintiffs' firm of solicitors were notified of the date.

The case came on for hearing on the fixed day by which day the solicitor had returned and assumed his functions but had not been notified of the fact that the case had been fixed for hearing. At the hearing the plaintiff and their counsel failing to appear, the action was dismissed with costs. The solicitor first came to know of the dismissal when his firm received the draft dismissal order from the defendants. Within six days he applied under O. 36 r. 33 to have the case restored for hearing.

The defendants resisted the application on the ground that the restoration would cause great injury to them in that their key witness had left the country and all their witnesses had dispersed so that it was very difficult or impossible to gather them together.

Held: (1) the solicitors of the plaintiffs had been negligent and their mistake must be condemned;

(2) since limitation did not apply it was open to the plaintiffs to re-institute their claim by a fresh claim. In view of this the objection of the defendants was not as substantial as it would appear at first and whatever injury they had suffered could be compensated by costs. The action must therefore be restored, the defendants having all the costs thrown away and of and incidental to the application.

Case referred to:—

(1) *Burgoine* v. *Taylor* (1878), 9 Ch. D. 1.